United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-5020

United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

IN THE MATTER
of
ISRAEL-BRITISH BANK (LONDON) LIMITED,
Bankrupt

ISRAEL-BRITISH BANK (LONDON) LIMITED,
Appellant,

FEDERAL DEPOSIT INSURANCE CORPORATION as successor in interest to Franklin National Bank and BANK OF THE COMMONWEALTH,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT ISRAEL-BRITISH BANK (LONDON) LIMITED

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Preliminary Statement

Honorable Morris E. Lasker, United States District Judge, rendered the decision appealed from. His decision and supporting opinion are reported only at 1 Bank. Ct. Dec. 1506 (Corporate Reorganization Reporter, Inc., Washington).

Statement of the Issue Presented for Review*

Does the provision of Section 4a of the Bankruptcy Act, 11 U.S.C. § 22(a) which excepts a "banking corporation" from the benefits of the Act as a voluntary bankrupt include a corporation organized under the laws of the United Kingdom, formerly engaged in the banking business with its place of business in London, and which never had a place of business, office or agent but only had assets in the United States, never qualified to do business as a banking corporation in the United States, never did business in the United States as a banking corporation and never was subject to the jurisdiction of any banking authority in the United States—national or state?

Statement of the Case

On September 23, 1974, a voluntary petition in bankruptcy was filed on behalf of Israel-British Bank (London) Limited (IBB) and on the same day it was adjudicated a bankrupt (A-53).** The Bank of the Commonwealth (Commonwealth) and Franklin National Bank (Franklin) moved to vacate the adjudication and to dismiss the voluntary petition in bankruptcy, as amended on October 10, 1974 (A-9), on the ground that under Section 4a of the Bankruptcy Act, 11 U.S.C. § 22(a), the court was without

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* The court below recognized that the issue presented by this appeal is one of first impression and is of great significance to the international banking community (A-53). The same issue has been presented in other bankruptcy proceedings instituted in the Southern District of New York: *In the Matter of Bankhaus I.D. Herstatt KGaA iL,* Bankrupt, No. 74 B 1134, an involuntary bankruptcy petition referred to Honorable Roy Babitt, Bankruptcy Judge; *Banque de Financement S.A.,* Debtor, No. 75 B 764, a Chapter XI proceeding referred to Honorable Roy Babitt, Bankruptcy Judge; and *Israel-British Bank Limited* [the Israeli parent of appellant], Bankrupt, No. 74 B 1635 an involuntary bankruptcy petition referred to Honorable John J. Galgay, Bankruptcy Judge.

** References designated (A-) are to pages in the Joint Appendix filed herewith.

jurisdiction over the subject matter of the proceeding (A-11, A-24). By decision and order of Honorable John J. Galgay, Bankruptcy Judge, dated December 19, 1974, the motions of Commonwealth and Franklin were denied in all respects (A-51). Commonwealth and the Federal Deposit Insurance Corporation as successor in interest to Franklin (FDIC) each filed notices of appeal to the District Court on December 27, 1974 (R-3, R-6).*

By decision and order of Honorable Morris E. Lasker, United States District Judge, dated October 10, 1975 (A-52), amended on October 17, 1975 (A-90), the decision and order of Judge Galgay were reversed and the voluntary petition in bankruptcy of IBB was dismissed.

Statement of the Facts

IBB is a corporation organized under the laws of the United Kingdom and formerly engaged in the banking business with its place of business in London. IBB never had a place of business, office or agent in the United States (A-54); never qualified to do business as a banking corporation in the United States (A-54, A-35); never did business in the United States as a banking corporation (A-54) and never was subject to the jurisdiction of any banking authority in the United States—national or state (A-35). IBB has property in the Southern District of New York, consisting of deposits in various banks totalling several million dollars (A-54).

On August 2, 1974, IBB filed with the High Court, Chancery Division, of the United Kingdom, a voluntary petition for the winding up of its affairs (A-54). On August 6, 1974, a receiving order was made by the High Court, Chancery Division, of the United Kingdom, appointing Arthur Thomas Cheek, Senior Official Receiver, Receiver and Provisional Liquidator of the property of IBB (R-23, A-54). On December 2, 1974, the High Court,

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* References designated (R-) are to Record on Appeal document numbers.

Chancery Division, of the United Kingdom, approved IBB's voluntary petition for the winding up of its affairs and ordered the winding up of its affairs (A-54).

IBB has numerous creditors both here in the United States and abroad (A-6). Included amongst the creditors of IBB are Commonwealth, having a claim in the sum of approximately $500,000 for monies loaned, and FDIC having a claim in the sum of approximately $2,000,000 for monies loaned (A-54, A-14, A-27).

Commonwealth is a lien creditor, having on July 22, 1974 levied upon upwards of $500,000 in bank deposits belonging to IBB, pursuant to an order of attachment dated July 22, 1974, issued by the United States District Court for the Southern District of New York (A-31, A-54). FDIC is also a lien creditor, Franklin having, on July 26, 1974, levied upon upwards of $2,000,000 in bank deposits belonging to IBB, pursuant to an order of attachment dated July 26, 1974, issued by the United States District Court for the Southern District of New York (A-16, A-54).

The liens of both Commonwealth and FDIC were perfected within four months of the filing of IBB's voluntary bankruptcy petition (A-54). Consequently, if IBB is adjudicated a bankrupt under the Bankruptcy Act, the Bankruptcy Court has the power to nullify and void those liens pursuant to Section 67a(1) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1) (A-54).

POINT I

Equality of distribution among creditors is a fundamental objective of the bankruptcy act and the act should be construed to promote and achieve that objective.

A fundamental, long recognized principle, and a prime objective of any scheme for dealing with financially distressed estates or persons is equitable distribution of assets amongst creditors. 3 *Collier on Bankruptcy* ¶ 60.01,

p. 743 (14th ed.). The theme of the Bankruptcy Act is equality of distribution. *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941).

As long ago as 1873, the Supreme Court in *Buchanan* v. *Smith*, 16 Wall. 277, 21 L. Ed. 280, 284, stated:

> "Equal distribution of the property of the bankrupt, pro rata, *is the main purpose* which the Bankrupt Act seeks to accomplish . . . ." (emphasis added)

In *In re Faulkner*, 161 F. 900, 903 (8th Cir. 1908), the court stated:

> "Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of the bankrupt pro rata among his creditors."

A principal objective and purpose of the Bankruptcy Act is to secure possession of an insolvent's assets and procure their equitable division among creditors and to prevent and avoid attempts of one creditor to obtain unfair advantage over other creditors. 1 *Remington on Bankruptcy*, § 17, p. 34.

> "* * * the purpose of the Bankruptcy Act is to bring about equality of division of assets amongst creditors. For the rule that to the diligent creditor belongs the reward, the act substitutes the rule that equality is equity." *Canright* v. *General Finance Corporation*, 35 F. Supp. 841, 844 (E.D. Ill. 1940).

In order to promote and achieve the aforementioned objective, a trustee in bankruptcy is equipped with an arsenal of weapons, included amongst which is Section 67a(1) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1), which invalidates liens against the debtor's property obtained through judicial proceedings (such as attachment, garnishment, judgment, levy), within four months of bankruptcy "(a) if at the time when such lien was obtained

such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act."

Commonwealth and FDIC are lien creditors, having obtained their respective liens by attaching the bankrupt's property in the United States within four months of the filing of the petition herein. If IBB is adjudicated a bankrupt, such liens are therefore, vulnerable to attack by a trustee in bankruptcy pursuant to Section 67a(1) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1). In pressing their objections to jurisdiction appellees are admittedly motivated by their desire to protect and preserve their vulnerable liens and thereby obtain an undue advantage over non-attaching general creditors. Were this court to hold that the "banking corporation" exception to Section 4 of the Bankruptcy Act extends to a *foreign* banking corporation such as IBB, whose only connection with the United States is the location of assets therein, it would create a vacuum within which the bankruptcy court would be powerless to deal with the assets of such a foreign banking corporation located in the United States, and would enable appellees, attachment creditors, to preserve the undue advantages they have obtained over non-attaching creditors. To read into Section 4 of the Act, such an extension and limitation on the bankruptcy court's jurisdiction would defeat its fundamental objective.

Nadelmann, *The National Bankruptcy Act and the Conflict of Laws,* 59 Harv. L. Rev. 1025, 1046 (1946) stated:

> "When local assets are attached after bankruptcy has been declared abroad and the foreign trustee is not permitted to collect the assets because of the attachment, a local bankruptcy adjudication becomes indispensible to secure equal distribution of the attached assets among all creditors."

In *In re Adams,* 1 Am. B.R. 95 (Ref. N.D. N.Y., September 12, 1898), the Referee stated:

> "The broad and general purpose of the Bankruptcy Act of 1898 to be gathered from its language is, as well as the protection of the bankrupt from suits against

> him for the collection of debts, the enforcement of equality among his creditors. In a case of doubt as to the construction and application of its various provisions, I deem it to be the duty of a referee to adopt that construction which seems best to promote that general purpose."

Thus, it is interesting to observe that within a few months of the enactment of the Bankruptcy Act of 1898 (30 Stat. 544, Chap. 541), early recognition was given to the rule of statutory construction enunciated in the *Adams* case.

This Judge Galgay effectively did in holding that IBB, a foreign banking corporation not engaged in the business of banking anywhere in the United States, but only having assets therein, could not be equated with a domestic banking corporation and hence embraced within the exclusion from bankruptcy of a "banking corporation". Several courts in dealing with the issue of whether a particular corporation came within the exclusions of Section 4 of the Bankruptcy Act held that the exclusions therein are to be strictly construed and corporations to be exempt must come clearly within one of the enumerated business types contained in Section 4 (A-36-51).

In *T. F. Korherr* v. *A. J. Bumb*, 262 F.2d 157, 162 (9th Cir. 1958), the court stated:

> ". . . statutes . . . being remedial in nature, should be liberally construed to effect their purpose . . . . Also, where words of exception are used, they are to be strictly construed to limit the exception."

In *Midland Cooperative Wholesale* v. *Ickes*, 125 F. 2d. 618, 626 (8th Cir. 1942) cert. den. 316 U.S. 673 (1942), the court stated:

> "The cardinal rule of statutory construction . . . requires exceptions to be strictly construed."

The Bankruptcy Act is a remedial statute, and is to be liberally construed with a view to carrying into effect its obvious purposes and intent. ***In re Russell et al.,*** 28 F. 2d 48, 49 (D. Del. 1928).

In *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission,* 286 U.S. 299, 311-312 (1931), the Supreme Court stated, in interpreting another remedial statute:

> "[The] Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

In *Murray* v. *Beal,* 97 F. 567 (D. Utah 1899), the court in construing the jurisdiction granted by Section 2(7) of the Bankruptcy Act of 1898 and the effect of an exception to the grant of jurisdiction therein contained, stated at page 568:

> "Since the grant of power to courts of bankruptcy should be liberally construed, in order that the act may have the beneficial effect intended, and be capable of harmonious execution, section 23b (an exception to that grant) should be strictly construed. In Epps v. Epps, 17 Ill. App. 196, the court said:
>
> 'It would seem that the same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged.'"

The court in *Murray* v. *Beal, supra,* further relied upon the opinion of Mr. Justice Story in *U.S.* v. *Dickinson,* 15 Pet. 141 (1841), wherein he stated at page 165:

> ". . . We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception, must establish it as

being within the words as well as within the reason thereof."

The banking corporation exception of Section 4 of the Bankruptcy Act has previously been strictly construed. Thus, in *In re Bay Cities Guaranty Building-Loan Ass'n.*, 48 F.2d 623, 624 (S.D. Cal. 1931), the court stated:

> "The Bankruptcy Act was amended in 1910, and was extended to cover moneyed, business, or commercial corporations. The provisions of the Bankruptcy Act creating exempt classes are strictly construed. . ."

This court should adopt a construction which tends to promote equity and equality in the distribution of the bankruptcy estate among all its creditors—attaching and non-attaching. The only construction that is compatible with and would promote and achieve the salutary objective of equality of distribution of assets is that the "banking corporation" exception of Section 4a of the Act does not extend to a foreign banking corporation such as IBB whose only activity in the United States was as a depositor in banks in New York City.

POINT II

The Banking Corporation exception of Section 4a of the Bankruptcy Act does not extend to a foreign banking corporation such as IBB which formerly did business in the United Kingdom, (1) never had a place of business, office or agent in the United States, (2) never qualified to do business as a banking corporation in the United States, (3) never did business in the United States as a banking corporation and (4) never was subject to the jurisdiction of any banking authority in the United States—national or state.

IBB contends that the banking corporation exception in Section 4a of the Act relates only to national banks and banking corporaions created or licensed under state or territorial laws, and does not encompass foreign banking

corporations such as IBB which have no business connection with the United States other than the location of assets here. IBB further contends that that in deciding to the contrary the court below erred in construing the legislative history of Section 4 of the Act and neglected to follow respectable judicial precedent and other authorities.

The court below conceded the propriety of consulting legislative history and acknowledged that judicial interpretation is not strait-jacketed by the words of the statute. Consideration of persuasive evidence, if it exists, is proper (A-59).

A. Legislative history establishes why banking corporations—national and state—were excepted from Section 4.

Section 4 of the Bankruptcy Act of 1898 (Pub. L. 171, 55th Cong., 30 Stat. 544, chap. 541), the original predecessor of the present law, provided:

> "**Sec. 4. Who May Become Bankrupts.**—(a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> (b) Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. *Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be, adjudged involuntary bankrupts.*" (emphasis added)

Thus the Act of 1898 excluded *all* corporations from becoming *voluntary* bankrupts, and while permitting certain kinds of business corporations to be adjudged *involun-*

tary bankrupts, excluded "national banks or banks incorporated under State or Territorial laws."

As originally proposed, the Act of 1898 had only excluded national banks and made no mention of state and territorial banks. 30 Cong. Rec. 606, 55th Cong., 1st Sess. (1897). *The need to exclude national banks* had been recognized early in the development of the current bankruptcy law.[1] In 1892, six years prior to the passage of the Bankruptcy Act of 1898, the impropriety of subjecting national banks to a general bankruptcy statute was noted in House Report No. 1674, 52 Cong., 1st Sess. 12 (1892):

> "National banks are excepted because there are now national bank laws for their supervision and liquidation which for the most part have proven satisfactory in practice."

The existence of other insolvency laws and proceedings was also stated as the reason for excluding national banks from the scope of the 1898 Act. The proponent of the bankruptcy bill in the Senate, Senator William Lindsay, explained the exclusion of national banks as follows:

> "There is a law now in force for the control and regulation of national banks, and it was thought best not to interfere with that law. In certain contingencies the government is responsible for the assets of such banks, and it is but reasonable that it should have entire control of them and of their liquidation in cases of dishonesty or insolvency." 30 Cong. Rec. 602, 55th Cong., 1st Sess. (1897).
>
> * * *
>
> *"There is already in existence a satisfactory law for the control and liquidation of national banks. Since the government is responsible for the bank notes issued by these banks in the event of their failure, there is good reason why it should have control of their liqui-*

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[1] *In re Manufacturers' Nat. Bank,* Fed. Case No. 9,051 (N.D. Ill. 1873) held that a national bank could not be adjudged a bankrupt under the Bankruptcy Act of 1867.

dation." 30 Cong. Rec. 606, 55th Cong., 1st Sess. (1897). (emphasis added.)

The House Judiciary Committee Report, House Report No. 65, 55th Cong. 2d Sess. 40 (1897) also noted the existence of other insolvency proceedings as a reason for excluding national banks:

> "The bill exempts national banks from being proceeded against in bankruptcy, for the reason that Congress has legislated especially in respect to them, and the most careful provisions exist for protecting all interests connected by the national banking laws,"

Congressman Robert N. Bodine suggested the reason *for excluding state* banks during the debate on the House floor, by pointing out some of the problems which would result if publicly regulated corporations, other than national banks, such as state banks, railroads and insurance companies were not also excluded from the proposed act:

> "I had supposed that these views were almost universally entertained by gentlemen on this side of the House, but to my surprise I find some of them supporting a bill wider and more grasping in its application and effects than any bankrupt bill that was ever enacted. It applies to all persons except farmers and to all corporations except national banks, and in its exceptions is as illogical, unique, and partial as it is severe and drastic in its application to other persons and corporations.
>
> "This bill is the first one of its kind to include corporations at all. It may be that there is a certain class of corporations that are as appropriately made subject to its provisions as are natural persons. I refer to those engaged in mining, manufacturing, merchandising, trading, and the buying and selling of property of any kind, and, in fine, engage in any business of the same kind as that usually carried on by individuals. But, this bill goes much further than this. It embraces insurance companies, both fire and life,

stock, mutual, assessment, or benevolent; it embraces building and loan associations, trust companies, savings banks, and all the other State banks.

"*Now, in nearly every State in the Union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes of corporations.* It is made the duty of designated officials to make critical and periodical examination of their affairs, to proceed against them when insolvent, and to take charge of their property, including the securities deposited for the protection of the beneficiaries, to distribute the assets pro rata among those having claims against such corporation, and, in fine, to do and perform all the duties of a trustee in bankruptcy.

"By this bill, at one fell swoop, all the jurisdiction of the several States as to these matters is taken away and vested in the trustee in bankruptcy, and the duties imposed by the State itself upon the officer of the bankrupt court, to be performed, no doubt, at an expense many fold greater; and if the experience of the past is any criterion, the creditors, the beneficiaries, or depositors, as the case may be, will receive but a pittance, and the funds to which they are equitably entitled will go into the pockets of the court officials.

"Under this bill a trustee in bankruptcy becomes the insurance commissioner, the railroad commissioner, the *bank examiner and commissioner* and the building and loan commissioner of the several States. The bill further provides that the business of the bankruptcy must be carried on for a limited period by the trustee. Under the tendency of courts to give a liberal construction to laws conferring jurisdiction upon them even the term 'limited' can be clothed with a very expansive meaning. Heretofore the Federal courts have confined themselves principally to carry on the business of the great railroads of the country; but now it is proposed to enlarge their business, to make them vast department stores, in which everything can be bought and every business conducted, from a railroad down to a peanut stand.

> "It is proposed that the trustee, for a 'limited' time at least, shall engage in competition with the local merchant. The bill does not provide to what extent the trustee may resort to the writ of injunction against his local competitors, but shrewdly leaves nature to take its course. In fine, Mr. Speaker, the bill intensifies many fold one of the greatest evils that afflict this country to-day, the accumulation of business and power in the hands of the United States courts. [Applause.] It involves a greater sacrifice of the jurisdiction and authority of the several States than any bill ever enacted; but not content with invading the domain of the State, not content with its jurisdiction over every kind of corporation organized for business purposes, it invades the domain of charity and religion." 31 Cong. Rec. 1939, 55th Cong. 2d Sess. (1898). (emphasis added).

Congressman Bodine's concern that a national bankruptcy act including all corporations except national banks would interfere with state regulation of certain businesses was not at the outset heeded by either House of Congress. The proposed bill as referred to Conference by both Houses retained the language of the original bill which excluded only national banks; *however, when the bill was reported out of Conference 4b was altered to exclude ". . . banks incorporated under State and Territorial laws . . ." in addition to national banks,* 31 Cong. Rec. 6426, 55th Cong., 2nd Sess. (1898). The Statement to Accompany the Conference Committee Report, 55th Cong. 2nd Sess. 31 Cong. Rec. 6427 (1898), *indicates that the Joint Committee accepted Congressman Bodine's position concerning state banking corporations:*

> "The great railroad and transportation companies *and banks incorporated under any law are left to be dealt with by the laws of the State creating them.* It would lead to much confusion and hardship and many complications should we undertake to subject the great railroad and transportation corporations to the provisions of this act. It is believed that they can be

better dealt with under other laws." (emphasis added)

The Act of February 5, 1903 (Pub. L. 62, 57th Congress, 32 Stat. 797, chap. 487) amended Section 4b of the Act of 1898 to permit involuntary adjudications of mining corporations, which some courts had held were excluded as not being a manufacturing, trading, printing, publishing or mercantile corporation. It is significant to observe that in enacting the 1903 amendment to Section 4b of the Act, Congress had an opportunity to re-examine the prior exclusion of "national banks or banks incorporated under State or Territorial laws" but left it unchanged.

By the Act of June 27, 1910 (Pub. L. 294, 61st Cong., 36 Stat. 838, chap. 412) Section 4 began to take on its current form. The 1910 amendatory act provided:

"Sec. 4. Who may become bankrupts.—(a) Any person, [who owes debts,] except [a corporation,] *a municipal, railroad, insurance, or banking corporation,* shall be entitled to the benefits of this Act as a voluntary bankrupt.

"(b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any [corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits] *moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation,* owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. [Private bankers, but not national banks or banks incorporated under State or Territorial Laws, may be adjudged involuntary bankrupts.]

"The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from

> any liability under the laws of a State or Territory or of the United States." (bracketed language deleted—emphasized language added by the 1910 Amendment)

The 1910 amendment made the following significant change in the *voluntary* features of Section 4: corporations "except a municipal, railroad, insurance, or banking corporation" were for the first time since the enactment of the Act of 1898 permitted to become *voluntary* bankrupts.

The 1910 amendment made the following significant changes in the *involuntary* features of Section 4 to alleviate the problems which had arisen in the courts over whether a particular corporation was included within the Act's enumerated corporations: (1) the Act of 1898, as amended in 1903, made "any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" subject to involuntary bankruptcy, while the 1910 amendment subjected "any moneyed, business, or commercial corporation" to involuntary proceedings "except a municipal, railroad, insurance or banking corporation," and (2) the sentence providing that "(p)rivate bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts" included in the Act of 1898 and retained by the amendatory Act of 1903, was deleted from that section since "banking corporations" was excluded from 4a and 4b.

Congressman J. Swager Sherley, the sponsor of the 1910 amendments, during the floor debate thereon stated that with respect to the purpose in modifying the language of Section 4b of the Act:

> "My next amendment undertakes to make a scientific classification of those who may be put into involuntary bankruptcy. As the bill was originally drawn, an effort was made to name in detail those individuals who were amenable to the law. Instead of stating the rules and then naming the exception, they simply reversed it, so that I provide that any 'moneyed, business, or commercial corporations, excepting municipal, railroad, insurance, or banking corporations may be put into in-

voluntary bankruptcy'." 45 Cong. Rec. 2275, 61st Cong. 2d Sess. (1910).

In the explanation of his bill during the Hearing before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 18694 (Bankruptcy), Feb. 3, 1909, Congressman Sherley stated that he did not intend the amendment of Section 4b to change the law:

> "There has been excepted out of the law always certain corporations—for instance, municipal, railroad, insurance, or banking corporations—*on the theory that all of those corporations partook either of a public or quasi-public nature that did not warrant their estates being adjudicated through bankruptcy proceedings,* and that it was wiser to hold them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or involuntary proceedings. *This amendment does not, in that particular, change the law at all.* Now these particular corporations are exempted. What is here proposed is to permit the voluntary filing of a petition by a corporation." (emphasis added)

The reason for excluding banks, railroads and insurance companies from the scope of the Act was discussed in terms of their nature as quasi-public corporations at the time of the 1910 amendments in House Report 511 (Judiciary Committee), 61st Cong. 2d Sess. (1910):

> "The reason for exempting the quasi-public corporations will be apparent. Banks are excepted from the operation of the law at present. Other business entities having similar responsibilities to the public are also excepted."

Section 4 of the Act of 1898 was amended by the Act of February 11, 1932 (Pub. L. 27, 72nd Congress, 47 Stat. 47, chap. 38).

The 1932 amendment extended the scope of the exclusionary clauses in Section 4a and 4b to include building and loan associations.

The report to accompany the amendment (House Report 98, 72nd Cong. 1st Sess. January 15, 1932) suggests the reasons for the exclusions from the Act:

> "When the national bankruptcy law was drafted it was thought wise to exempt from its operation municipal, railroad, insurance, and banking corporations. At that time building and loan associations were not as extensive and through oversight or otherwise these associations were not included in the exemption. *Every reason which obtains for exempting the corporations above referred to obtains in so far as building and loan associations are concerned.*
>
> "This legislation is sponsored by the United States Building and Loan League, and so far as the committee has been able to ascertain no one connected with the building and loan associations opposes this legislation. However, it has been suggested that by reason of the fact that in two States in the Union no law exists controlling building and loan associations that this might be a reason for not exempting these associations from the operation of the bankruptcy law. It will be remembered that if the bankruptcy law is not invoked in connection with building and loan associations that this in no way interferes with the State equity laws and whether a State has supervisory control over building and loan associations or not those interested may at all times take advantage of State insolvency laws. Building and loan associations are of a peculiar nature, associations functioning almost exclusively in local communities. The deposits received are from local depositors and the securities taken are local securities. Therefore, it seems the part of wisdom to leave the administration of these matters in the local courts.
>
> "The only change which this bill makes in existing law is to include building and loan associations in the same category with municipal, railroad, insurance and banking corporations so far as bankruptcy is concerned." (emphasis added)

The Act of May 15, 1935 (Pub. L. 60, 74th Congress, 49 Stat. 246, chap. 114) amended Section 4b of the Act of 1898. This amendatory act broadened the class of persons who would be considered "farmers" and thus exempted from involuntary bankruptcy, and a discussion thereof is not relevant to the problems presented in the instant case.

The Act of 1938 (commonly known as the Chandler Act, 11 U.S.C. § 2[illegible] Pub. L. 696, 75th Congress, 52 Stat. 840, Chap. 575) d[illegible] not radically alter Section 4 as it stood after the 1935 Amendment and there is no change therein relevant to the problems presented in the instant case.

In summary, legislative history of Section 4 of the Act establishes that:

1. The reason for the exclusion o[illegible]ational banks was the existence of alternative legislation which regulated their supervision and liquidation. See statement of Senator Lindsay, *supra*, page 11.

2. The reason for the exclusion of state banks was that "there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings" in case of insolvency. See Bodine, *supra*, page 12.

3. Banks partook of a public or quasi-public nature which warranted their estates being administered through alternative legislation. See statement of Congressman Sherley, *supra*, page 16, and House Report on 1910 Amendment, *supra*, page 17.

4. The excepted corporations function almost exclusively in local communities and their administration should be left to local courts. See House Report on 1932 Amendment, *supra*, page 18.

As the legislative history thus demonstrates, Section 4 of the present Bankruptcy Act evolved as a result of many changes. It began to take on its current form as a result of the 1910 Amendatory Act.

The exception of a "banking corporation" from the benefits of the Act was first enacted in those words in 1910,

although the policy of excluding certain banking corporations was earlier conceived in the 1898 version of Section 4b (A-67). The last sentence of Section 4b of the Act of 1898 read as follows:

> "Private bankers but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

The sentence was eliminated by the 1910 amendment, and the words "banking corporation" substituted therefor.

With respect to this change, the court below stated that in order for IBB to prevail it must demonstrate that despite this change in language, Congress intended the "jurisdictional rule" of the earlier statute to survive the 1910 revision (A-67-68).[2]

The court below improperly imposed this burden on IBB, by failing to recognize and give effect to the well settled rule of statutory construction that legislative intent to change meaning will not be inferred unless such intent is clearly and indubitably manifested. *Ruth* v. *Eagle-Picher Company,* 225 F. 2d 572, 575 (10th Cir. 1955). Amendments by implication like repeals by implication are not favored. *United States* v. *Welden,* 377 U. S. 95, 102 (1964). Before a court will find that Congress has amended a statute there must be clear evidence of an intent to do so. *Freeman* v. *Chicago Title & Trust Co.,* 505 F. 2d 527, 533 (7th Cir. 1974).

In the 1910 Amendment, not only is there no clear manifestation or evidence of Congressional intent to change the meaning of the above-quoted sentence of the 1898 Act, *but there is clear evidence that no change in the law was intended.*

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[2] Since the exception in the present Act for banking corporations is identical in Sections 4a and 4b the court below correctly concluded that if the exception in Section 4b only covers national banks and banks incorporated under State and Territorial laws, that fact is relevant to the determination whether foreign banking corporations are covered under Section 4a (A-69).

The use of the term "banking corporation" in the 1910 Amendment was intended by Congress merely as a substitute for the words "national banks or banks incorporated under State or Territorial laws" and no change in the law was intended thereby. This is the view universally expressed by recognized and respected authorities.

In 1912, two years after the 1910 amendment to the Act, Loveland in commenting thereon in *A Treatise on the Law and Proceedings in Bankruptcy,* § 128, pp. 280-281 stated:

> "The statute expressly excepts banking corporations from the operation of the act either as voluntary or involuntary bankrupts.
>
> "It is plain that congress intended to exempt from the operation of the act all banks organized for the purpose of carrying on a banking business and incorporated under the national banking act or under the law of a state or territory.
>
> "Congress has provided a method of winding up and settling the affairs of national banks. It has never been conceived that a general bankruptcy act will supersede or repeal the special provisions of the national banking act for winding up insolvent national banks.
>
> "State banks were held subject to be adjudged bankrupts as moneyed, business, or commercial corporations under the act of 1867. Banks organized for the purpose of carrying on a banking business and incorporated under the law of a state or territory are not subject to adjudication under the present act." (footnotes omitted)

Black, *A Treatise on the Law and Practice of Bankruptcy* (3rd ed , 1922) § 137, p. 311 stated:

> "The original provision of the bankruptcy law on this point was that 'private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts.' (Section 4.) The amendment of 1910 excludes from the

> operation of the act 'banking corporations,' *which apparently leaves the matter much as it stood before.*" (emphasis added)

1 Collier on Bankruptcy (14th ed.) ¶ 4.01 [2.3] pp. 574-575, in discussing the changes made in Section 4b of the Act by the 1910 amendments, states at p. 575:

> "The sentence concerning the involuntary adjudication of banks and bankers, which had been added by the amendatory Act of 1903,[3] was now *superfluous* and was deleted." (emphasis added)

B. Judicial construction establishes why banking corporations—national and state—were excluded from Section 4.

The courts have been called upon to determine whether a particular enterprise was a banking, railroad, or insurance corporation. Contained in such cases are statements by various courts interpreting Congressional intent in excluding certain corporations from adjudication as bankrupts as well as Congress' intent in amending the Act of 1910.

In *In Re Supreme Lodge of the Mason's Annuity,* 286 F. 180, 184 (N.D. Ga. 1923) the court, in holding a fraternal benefit association not subject to the Bankruptcy Act as an insurance corporation, stated the reason for the 1910 amendment to the Act and also interpreted Congressional intent in excluding certain corporations from the scope of the Act.

> "The Bankruptcy Act of 1898 made subject to involuntary bankruptcy 'corporations *engaged principally* in manufacturing, trading, printing, publishing, mining (Act of 1903), or mercantile pursuits.' This test involved, not only difficulties of legal definition,

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[3] The "banks and bankers" sentence was originally in the Act of 1898 and was carried over without change in the amendatory Act of 1903, and only in this respect the above quoted statement is incorrect.

but a question of fact, often intricate, as to the nature and amount of actual business, whereby great confusion arose. For remedy the amendment of 1910 (Comp. St. § 9588) re-established the test of the act of 1867, adopting also, by a familiar rule, the judicial construction which had arisen of it, with the modification that no municipal, railroad, insurance, nor banking corporations were to be bankrupts, either voluntary or involuntary. *No reasons for making these exceptions were assigned by the committees of Congress, but they may be surmised to lie in the public or quasi public nature of the business, involving other interests than those of creditors, in the desirability of unarrested operation, the completeness of state regulation, including provisions for insolvency, and the inappropriateness of the bankruptcy machinery to their affairs.*" (emphasis added)

The quoted language from *Mason's Annuity* was cited with approval by the Fourth Circuit in *Sims* v. *Fidelity Assurance Ass'n*, 129 F. 2d 442, 448 (4th Cir. 1942), aff'd 318 U.S. 607 (1943).

In holding a trust company a banking corporation within the meaning of § 4b of the Act, the Court of Appeals in the Fifth Circuit in *Woolsey et al.* v. *Security Trust Co. et al.*, 74 F.2d 334, 337 (5th Cir. 1934), stated the reason for the exclusion as follows:

> "The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation of the banking corporations *of the country* to the well-organized departments of the states and the nation, organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, excludes them. *Federal laws provide elaborately for the supervision and liquidation of national banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection afforded by*

direct governmental supervision and control. It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended, by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed, to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking laws, with banking privileges and powers, operated though it was under those laws, and now being liquidated, as it is, under them." (emphasis added)

In *In re Prudence Co., Inc.*, 10 F. Supp. 33, 39 (E.D.N.Y. 1935) aff'd 79 F.2d 77, *cert. den.* 296 U.S. 646 (1935) the court in holding a mortgage investment company not a banking corporation, stated the Congressional purpose in excluding certain corporations from the Act as follows:

"It may reasonably be inferred that *when Congress exempted banking corporations from the operation of the Bankruptcy Act, it did so because of the quasi public nature of the business, involving interests other than those of creditors, and the inappropriateness of the bankruptcy machinery to their affairs.* With these considerations in mind, it is manifest that there cannot be a practical application of the exemption to a given corporation if its actual activity is ignored. It need not be determined here, however, when the charter of a corporation alone suffices to determine its status under the Bankruptcy Act. It is enough for present purposes to state that when a corporation is empowered to do a nonbanking and banking business, *the court can only determine the corporation's true nature for bankruptcy purposes by inquiring into the actual business*

> *which it conducted and if it appears that the corporation engaged only in activities of a general business nature under its nonbanking powers, it must be held to be not exempt from the operation of the Bankruptcy Act.*" (emphasis added)

This Court in *Union Guarantee & Mortgage Co.* v. *Van Schaick, Supt. of Insurance,* 75 F.2d 984, 984 (2nd Cir. 1935), held that a company organized under the insurance laws of New York which guaranteed mortgages was an insurance corporation and therefor could not be adjudged a bankrupt. In reaching its decision the court stated the reason for the 1910 amendment and the purpose of excluding certain corporations from bankruptcy as follows:

> "The purpose of Congress in the amendment of 1910 to section 4, 11 USCA § 22, was to make a comprehensive definition with certain exceptions, rather than to enumerate the kinds of companies which were subject to bankruptcy. *The purpose of the exception is not self-evident; we must infer it as best we can from such similarity as exists between the excepted groups. All except municipalities are companies for profit whose businesses are now generally regarded as 'affected with a public interest'; that is to say, as touching enough persons who must deal with them at some economic disadvantage, to require public supervision and control.* And municipalities are even more directly within public control. The most natural inference is that *Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise.*" (emphasis added)

The language of *Union Guarantee, supra,* was quoted with approval by the District Court in New Jersey in *In Re National Mortgage Corporation,* 17 F.Supp. 54, 55 (D.C.N.J. 1935), which held that a company that sold guaranteed mortgages was an insurance company and hence excluded from the provisions of the Bankruptcy Act.

In *Island Mortgaging Corp.*, 18 F.Supp. 448, 449 (E.D. N.Y. 1937), the District Court for the Eastern District of New York, holding a corporation not subject to bankruptcy as an insurance corporation, stated that Congress intended to leave certain corporations of a quasi-public nature under the control of the several states:

> "Congress has seen fit to exclude from the operation of the Bankruptcy Act certain types of corporations which, because of their quasi-public nature, were assumed to belong wholly under state supervision and control. It is not the function of the court to question this expression of policy. On the contrary, the court should, under the Constitution and laws as they now stand, refrain from reaching out to assume jurisdiction in matters which are believed to properly belong within state domain."

As recently as April of 1975, the district court in *In re Equity Funding Corp. of America* considered the exception for insurance companies and analyzed the Congressional purpose in excluding insurance companies in terms logically applicable to banking corporations:

> "*The foregoing conclusion is consistent with the purposes for which Section 4 was enacted. With the exception of municipalities, Section 4 excludes businesses which are affected with a public interest. These businesses require public supervision and control because they deal with people who are at an economic disadvantage, vis-á-vis these enterprises. In the case of insurance companies, most states have enacted regulatory schemes which include provisions for insolvency. Since these schemes are designed to protect the interests of policy holders and to provide for the adjustment of the rights of creditors and policy holders in the event of insolvency,* Congress in enacting Section 4 decided that liquidation of insurance companies should be left to the states. In re Union Guarantee & Mortgage Co., 75 F.2d 984 (2d Cir. 1935); In re

Supreme Lodge of the Masons Annuity, 286 F. 180, 184 (N.D.Ga. 1923). Since the reorganization of an insurance company or its adjudication as a bankrupt under the Act would preempt state liquidation proceedings for that company, Congress enacted Section 4 to preserve the exclusive jurisdiction of the states over the liquidation of insurance companies and to prevent the reorganization of insurance companies or their adjudication as bankrupts. *See* Woolsey v. Security Trust Co., 74 F.2d 334, 337 (5th Cir. 1934).

By preserving state liquidation proceedings, Congress sought to prevent bankruptcy or reorganization courts from interfering with comprehensive state insurance regulations and with the rights of insureds protected by such regulation. *See* In re Union Guarantee & Mortgage Co., *supra;* In re Supreme Lodge of the Masons Annuity, *supra.* As the language of Section 4 suggests, Congress determined that interference with state insurance regulations would not occur as long as bankruptcy courts did not reorganize insurance companies or adjudge them to be bankrupts. To assure that this congressional intent is in harmony with the language of Section 4, as interpreted above, a bankruptcy court should consider the impact of its exercise of jurisdiction on state insurance proceedings and regulations when determining whether its action is tantamount to a reorganization of an insurance company.'' 396 F.Supp. 1266, 1275 (C.D.Cal.) (emphasis added)

C. Legal periodicals and journals support the foregoing conclusions as to why Congress excluded national and state banks from Section 4.

In an article published in the April 1962 issue of *Journal of the National Association of Referees in Bankruptcy* (Vol. 36, No. 2) entitled ''Jurisdiction and Venue in Bankruptcy'', the authors Charles Seligson and Lawrence P. King, in commenting upon the reasons for the exclusion of municipal, railroad, insurance, or banking cor-

porations and building and loan associations, state at p. 38:

> *"Those corporations that are totally excluded from the operations of the Act are of such a nature that they are otherwise regulated. All are public or quasi public entities which exist and are controlled under state or federal statutes, having separate provisions for liquidation.* In the event such liquidation is required, many members of the public may be affected because of the service rendered and an expert in the particular sphere of activity is in the best position to supervise the salvation or dissolution of the enterprise. Thus an insurance company is usually under the close scrutiny of a state insurance department and the Superintendent of Insurance is better qualified to regulate the operations of the company than a court of bankruptcy. The same holds true for the other excepted groups, e.g., municipal corporations, banking corporations, and building and loan associations. It was obviously felt by Congress that all other types of corporations do not need special handling and may be competently administered in the bankruptcy courts, especially without adversely affecting the rights or convenience of the general public." (emphasis added)

In an article published in *1 Int'l. & Comp. L.Q.* (4th Ser.) 484 (1952) London, England, reprinted in the April 1953 issue of the *Journal of National Association of Referees in Bankruptcy* (Vol. 27 No. 2) entitled "Revision of Conflicts Provisions in the American Bankruptcy Act", the author Kurt Nadelmann, in commencing upon the applicability of the Bankruptcy Act to companies and corporations, states at page 54:

> "The American Bankruptcy Act is applicable to companies (corporations), except banking and insurance companies, *which are subject to state law.*" (emphasis added)

In summary, courts have determined and legal authorities have concluded that the reasons for the exclusions of na-

tional and state banks are:

1. The public or quasi-public nature of the business, involving other interests than those of creditors, the desirability of unarrested operation, the completeness of state regulation, including provisions for insolvency, and the inappropriateness of bankruptcy machinery to their affairs.

2. Federal laws provide elaborately for the supervision and liquidation of national banking corporations; the laws of the state do the same for state banks in order to protect the millions who deal with them on the faith of the protection afforded by direct governmental supervision and control and who would otherwise be at an economic disadvantage vis á vis these enterprises.

D. IBB was not a banking corporation under Section 4 of the Act.

IBB undeniably was a bank in the United Kingdom. In the United Kingdom, IBB was, prior to the filing and approval of its petition for winding up, a bank not because the word "bank" appeared in its title, but because it functioned as a bank by carrying on activities related to "banking" which is defined as the business of receiving money on deposit, lending money, discounting notes for circulation, collecting money on notes deposited, negotiating bills and similar activity. See *The Mercantile Bank* v. *New York,* 121 U.S. 138 (1887); *Marvin* v. *Kentucky File Trust Co.,* 218 Ky. 135, 291 S.W. 17, 18 (1927); *Warren* v. *Shook,* 91 U.S. 704 (1876).

IBB undeniably was not engaged in banking activities anywhere in the United States. It had not qualified as a banking corporation in the United States (A-54). It was, therefore, merely a foreign corporation holding property in the United States. It was not a bank in the United States, since it had no place of business here, it had no office or agent here and it never carried on any activity related to "banking" here (A-54). It may have been a bank in the United Kingdom, but in this country it was an ordinary depositor of funds in various New York banks.

Under the foregoing circumstances, it was never subject to the jurisdiction of any federal or state banking authority.

Hence, IBB was, as to the United States, and as to the Bankruptcy Act, merely a foreign corporation without a domicile or a place of business in the United States, but having property in the United States and having creditors here, some of whom have asserted and obtained attachments against IBB property in the United States. For the court below to state that the argument does not wash (A-56) because there "is no provision in the Act which states that a foreign corporation must operate as a bank within the United States in order to either enjoy the benefits of bankruptcy or to fit within the Act's exception" (A-56, 57) is virtually to state that the statute declares a rule with no purpose or objective. The court's efforts to attempt to squeeze IBB into the mold of a domestic bank or a foreign bank licensed to do business here by pretending that the pivotal fact (to wit, that it never carried on a banking business here) is irrelevant "to the initial determination of whether jurisdiction exists" (A-84) is to completely ignore the significance of the existence of federal and state regulations to the corporations that are totally excluded from the operation of the Act. See Seligson & King, *supra,* page 27.

In *United States* v. *State of Louisiana,* 225 F. Supp. 353, 361 (E.D. La. 1963) the court said:

> "As we see it, *purpose* carries the meaning of Coke's 'true reason' for the law in the light of the situation at which it is aimed. Heydon's Case, 3 Co.Rep. 7a, 7b, 76 Eng.Rep. 637 (1584). '[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. * * * And so the bottom problem is: What is below the surface of the words and yet fairly a part of them?' Frankfurter, Some Reflections on the Reading of Statutes, 47 Col.L.Rev. 527, 533 (1947). Purpose then, or the 'true reason' for the law, determined as objectively as possible, is an essential part of

the context within which a law must be read, if the Court is to appraise fairly the validity of the law. Llewellyn stated this well:

> 'If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense. * * * [When there are] ideas consciously before the draftsmen, the committee, the legislature, * * * talk of 'intent' is reasonably realistic; committee reports, legislative debate, historical knowledge of contemporary thinking or campaigning which points up the evil or the goal can have significance.' Llewellyn, The Common Law Tradition 374 (1960)."

Further, the court below recognized that judicial interpretation is not straitjacketed if the legislative history evidences a purpose or objective at odds to the plain reading of the statute (A-59).

Applying the foregoing, appellant submits the following:

I. (a) *"A plain reading"* of the statute, indulged in by the court below, is that "all banks" are excepted in Section 4 of the Act.

(b) *The purpose or objective* of Congress was that "all banks" so excepted are pervasively regulated by alternative federal or state statutes in their operation and in their liquidation, and their liquidation should be pursuant to those statutes.

(c) *At odds with the aforesaid "plain reading"* is that foreign banks not engaged in the banking business in the United States and *not licensed as a bank to do business in the United States* are *not* so regulated, pervasively or otherwise, by alternative federal or state statutes.

(d) Ergo, to include foreign banks not so engaged in the banking business in the United States within the exception would be at odds with the "plain reading" of the statute.

Hence, in the face of legislative intent and judicial interpretation which evidences the purpose or objective at odds with the plain reading of the statute, courts should not embrace within the statute such a foreign bank.

In reaching out for the existence of alternative regulation of IBB the court below found it in "the existence of alternate schemes of regulation of foreign banks by other *countries* such as here, the United Kingdom" (A-82). And "[f]urthermore, if Congress intended to exclude from bankruptcy adjudication certain companies for which there was already an extensive regulatory scheme for liquidation, the liquidation laws and banking laws of foreign countries such as the United Kingdom could serve that objective as easily as state schemes" (A-79).

It needs neither extended discussion nor voluminous citation to support the legal premise that the laws of foreign countries cannot protect assets in the United States from being appropriated by individual creditors in the United States. Further, a national legal system cannot make its actions dependent upon administrative or judicial measures abroad.

The instant case is clearly illustrative: Attachments by the appellees are vulnerable to attack under Section 67a of the Act and thus assure equal distribution to American creditors. Under the laws of the United Kingdom they are not subject to attack and preferences obnoxious to American principles and policies will prevail.

II. (a) "*A plain reading*" of the statute, indulged in by the court below, is that *all* banks are excepted under Section 4.

(b) *The purpose or objective* of Congress in excluding banking corporations is "the public or quasi-public nature of the business, including other interests than those of creditors; the desirability of unarrested operation; and the inappropriateness of the bankruptcy machinery to their affairs" (A-81).

(c) *At odds with the aforesaid "plain reading* is the fact that a foreign bank neither licensed to engage nor engaged in the banking business in the United States is (1) not possessed of a public or quasi-public nature involving other interests in the United States than those of creditors, (2) it is not desirable to continue unarrested its non-existent operation and (3) the bankruptcy machinery is *particularly appropriate* to a foreign banking corporation not doing business here but holding property in the United States and having creditors here in that it would permit the recapture of assets improperly transferred before the proceeding is *instituted;* it would permit, upon the filing of the petition, the placing of the bankrupt's property in the possession of a trustee under the exclusive custody of the bankruptcy court; it would invoke the broad power of the trustee to invalidate for the benefit of all creditors present bankruptcy transactions involving preferential and fraudulent liens, transfers and payments made within limited periods of time prior to filing; it would permit the trustee as a representative of the creditors to utilize the arsenal of weapons available to him under Sections 60, 67 and 70 of that Act.

All of the foregoing would prevent the dismemberment of the estate in the United States by local actions and would permit the trustee to deal with the assets that happen to be found in this country for the equal benefit of all creditors, domestic and foreign. It would afford to the foreign bank, the power to stay multiple suits. *All of the foregoing evidences the particular appropriateness of the bankruptcy machinery in the affairs of such a foreign bank.*

(d) Ergo *to include foreign banks neither licensed nor engaged in banking in the United States within the exception would be at odds with the "plain reading" of the statute.*

E. Congress at the time of the enactment of the exceptions to Section 4 also had in mind foreign corporations.

The court below has stated that Congress never considered whether foreign banks are to be treated differently than domestic banks (A-60). It is submitted that there is not only no evidence to support this conclusion, but a reading of the Bankruptcy Act as a whole discloses that Congress in enacting the Act of 1898 effectively dealt with the situation of a foreign banking corporation, or any foreign person or corporation for that matter, whose only connection with the United States, as in the instant case, is the location of assets therein.

The United States is amongst the group of countries where location of assets in the country is sufficient to confer jurisdiction for a bankruptcy declaration, and the Bankruptcy Act of 1898 was the first federal enactment making it possible to declare bankrupt a non-resident debtor with property in the United States. Nadelmann, *The National Bankruptcy Act and the Conflict of Laws, supra.* At pages 1035-1039 of this significant article, Dr. Nadelmann[4] develops the history of the clause in Section 2a(1) of the Bankruptcy Act of 1898, 11 U.S.C. Sec. 11a(1) [See Addendum *infra,* p. 43] which deals with bankruptcy jurisdiction over the assets of non-residents,[5] beginning

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[4] Dr. Kurt Hans Nadelmann is probably the outstanding authority on the subject of international bankruptcies and conflict of laws. The Advisory Committee cites Nadelmann, *The National Bankruptcy Act and the Conflict of Laws,* 59 Harv.L.Rev. 1025, 1041-46 (1946), in its Note to Bankruptcy Rule 119. For a biographical sketch of Dr. Nadelmann and a description and discussion of his extensive writings in the area of international and interstate conflict of laws see *Conflict of Laws: International and Interstate, Selected Essays by Kurt H. Nadelmann* (Martinus Nijhoff, The Hague, 1972). This volume was published by Dr. Nadelmann's colleagues at the Harvard Law School as a tribute to him and in appreciation and recognition of the significance of his writings and contributions to learning.

[5] The reference in Section 2a(1) of the Act to "property within their jurisdiction" may be viewed as establishing jurisdiction as well as prescribing venue. Advisory Committee's Notes to Rule 116 of the Rules of Bankruptcy Procedure. See footnote 2 to the opinion of the Court below (A-86).

with Circuit Judge John Lowell's article in the first issue of the *Harvard Law Review* in 1898, through the introduction of the Lowell Bankruptcy Bill in the Senate in 1882 and finally the Torrey Bill of 1890, which eventually became the Bankruptcy Act of 1898.

Under the present Bankruptcy Act, location of assets within the United States is sufficient to give bankruptcy jurisdiction. Nadelmann, *Solomons* v. *Ross and International Bankruptcy Law,* 9 Modern L. Rev. 154, 164 (1946). Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act, supra.* Nadelmann, *The American Bankruptcy Act and Conflicting Administrations,* 12 Int'l & Comp. L.Q. 684, 685 (1963).

In 9 Modern L. Rev., *supra,* Nadelmann, citing Section 2a(1) of the Bankruptcy Act states at page 164:

> "Under the present Federal Bankruptcy Act, location of assets within the United States is sufficient to give bankruptcy jurisdiction. Attachment liens obtained during the four-month period preceding the filing of the bankruptcy are void under the Bankruptcy Act if at the time of the attachment the debtor was insolvent. By means of a bankruptcy declaration in the United States the creditor who attaches after bankruptcy has been declared abroad may therefore lose his preference."

In 1 Int'l & Comp. L.Q., *supra,* Nadelmann again citing Section 2a(1) of the Act, states at pages 488-490:

> "Under the American Bankruptcy Act, existence of assets in the United States suffice to furnish jurisdiction for a bankruptcy adjudication. The debtor need not be a resident of the United States or have carried on business in the United States, as would be required under the system followed by some other countries . . .
>
> "The reasons for allowing a bankruptcy adjudication when assets are in the United States, whatever the place of residence of the debtor, have not always been appreciated abroad. Under the American Rules of conflict of laws, a foreign trustee in bankruptcy may

not defeat rights which local creditors acquired by attaching local assets, even if such attachments took place after the adjudication abroad. Decisions in many states are to that effect. *Grant of bankruptcy jurisdiction to the federal court where the assets are located creates the possibility of bringing local assets under bankruptcy control and of proving for their equal distribution among all crditors. A preference obtained by attachment after adjudication abroad will regularly be voidable under the provisions of the American Bankruptcy Act. Attaching creditors can thus be deprived of the benefits of the preference—which is not the case under some other systems. The very possibility of a bankruptcy adjudication in the United States has in fact discouraged attachments after an adjudication abroad.*" (emphasis added)

In *In re Berthoud,* 231 F. 529 (S.D.N.Y. 1916) an involuntary petition in bankruptcy was filed against an alleged bankrupt. On the face of the petition it appeared that the alleged bankrupt did not have his principal place of business, nor did he reside, nor did he have his domicile within the United States. Jurisdiction rested upon the assertion that the alleged bankrupt had property within the jurisdiction of the court, namely, a deposit in a bank account in New York City. A motion for an order of adjudication on the involuntary bankruptcy petition was opposed by a creditor who had attached the aforementioned bank account within four months of the filing of the petition on the jurisdictional ground among others, that where the only basis for jurisdiction was the location of assets within the territorial limits of the court, the court did not have the power to adjudicate.

In rejecting this argument, the court in *Berthoud* says at pages 532-533:

"The whole structure of the act indicates that under certain circumstances the proceeding was a sort of proceeding in rem. Under section 2 of the act, residence or domicile of the locus of the principal place of business is immaterial if there is property within

the United States and the statute confers jurisdiction even in the case of those who have been adjudged bankrupts by courts of competent jurisdiction without the United States, provided that such persons have property within the jurisdictions of the United States.

"In many other provisions of the statute the word 'property' will be found; and it is apparent that Congress intended that the United States courts should deal with and administer the estates of bankrupts if property existed and was found within our borders. Starting with this premise, it logically follows that Congress did not mean to exclude from the operation of the act those persons who are aliens, whether living here or abroad, who have property within the United States.

"While it is true that the beneficent features of the act may thus be availed of by aliens, yet, on the other hand, there is no reason why our own citizens should be discriminated against in the right to have their property laid hold of and administered under the act by reason of the mere fact that the owner of the property is not a citizen or resident of the United States; the word 'resident' being used in its comprehensive meaning. This view is fortified by the provision which confers jurisdiction where property is here, even though the owner has been adjudged a bankrupt by foreign courts.

"Realizing, of course, that the United States is engaged in a world-wide business, it is fair to assume, as matter of policy and comity, that Congress intended to give all persons, whether citizens, or residents, or neither, equal opportunity to share in the distribution of the property. It seems to me, therefore, that whether the alleged bankrupt is an alien, or his creditors are aliens, or both, the United States courts have jurisdiction, provided there is 'property within their jurisdictions'."

See also *In re Neidecker et al.,* 82 F.2d 263 (2d Cir. 1936), Collier, *Law of Bankruptcy and the National Bank-*

ruptcy Act of 1898 (1898), pp. 27-28, *Brandenberg on Bankruptcy* (4th ed. 1917), § 59, p. 103, Black, *supra*, § 19.

The court below somewhat equivocally rejects appellee's argument that adequate provisions exist under state law for IBB's liquidation (A-80). The appropriate provision for the voluntary dissolution of a foreign banking corporation in New York is Banking Law Section 605(11)(a) (McKinneys, 1971). It, however, applies only to a foreign *banking* corporation ". . . licensed pursuant to article 5 of this chapter . . .". IBB was not so licensed (A-35).

Nonetheless, the court states that New York Business Corporation Law (B.C.L.) Section 1202(a)(4) "presumably" applies to IBB (A-80). Reference to the "Application" section of the B.C.L. (§ 103) reveals, however, that foreign corporations which could only be formed under the Banking Law if formed here are not subject to the B.C.L. IBB is such a corporation.

Additionally, a foreign corporation for purposes of the B.C.L. is defined in Section 102(7) as a corporation which *could* be formed under the B.C.L. if formed here. IBB is not such a corporation.

All cases cited by the court in its footnote 11 (A-88) were decided not under the B.C.L. as indicated, but under its now repealed predecessor, § 977b of the Civil Practice Act.

F. A court may place itself in the position of Congress and determine how it would have acted had it faced the particular circumstances in question.

The court below concludes at p. 32 (A-84) that "where Congress has [not] considered the application of the statute to the particular facts at hand, and where adherence to the statutory words themselves does not frustrate the general objectives of the legislation, the words must be given effect as they read." IBB contends that the legislative history of Section 4 clearly and adequately demonstrates that the "banking corporation" exception was *only* intended to apply to *domestic* banking corporations.

Be that as it may, there is considerable authority which permits a court to place itself in the position of Congress and determine how it would have acted had it faced the particular circumstances in question. The general policy of a statute is critical to this analysis. Justice Douglas, speaking for the Supreme Court stated in *Markham* v. *Cabell*: "Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . ." 326 U.S. 404, 409 (1945). In so stating, Justice Douglas was affirming Judge Learned Hand of this court who had written:

> "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham,* 148 F. 2d 737, 739 (2d Cir. 1945).

Judge Kaufman of this court stated this point well in *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.,* 326 F. 2d 841, 845 (2nd Cir. 1963):

> "It is axiomatic that statutes are to be interpreted, whenever possible, to effectuate their underlying purpose and intention. United States v. Bryan, 339 U.S. 323, 338, 70 S.Ct. 724, 94 L.Ed. 884 (1949); Cawley v. United States, 272 F. 2d 443, 445 (2d Cir. 1959). And the English language is seldom so explicit that it may be interpreted in a vacuum. Thus Corbin has warned that a 'word, appearing suddenly, in empty space and with no history, would express nothing at all. To be expressive of any meaning, all words must have a context and a history * * *' 3 Corbin, Contracts 90 (1960)."

In the *Cawley* case cited by Judge Kaufman, Judge Hand stated at page 445:

> ". . . unless they explicitly forbid it, the purpose of a statutory provision is the best test of the meaning

> of the words chosen. We are to put ourselves so far as we can in the position of the legislature that uttered them, and decide whether or not it would declare that the situation that has arisen is within what it wished to cover. Indeed, at times the purpose may be so manifest as to override even the explicit words used. Markham v. Cabell, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165."

More recently, Judge Feinberg of this court addressed a problem under the Bankruptcy Act involving an inconsistency between sections of said Act. He resolved it as follows:

> ". . . we have a series of inconsistent sections which create a fundamental ambiguity. We are required, therefore, to construe the Bankruptcy Act as best we can. We believe that in such circumstances resort to the equitable powers of a bankruptcy court to fashion a remedy for this aberrant situation is justified." *In Re Miracle Mart,* 396 F. 2d 62, 64 (2nd Cir. 1968).

IBB is requesting this court to place itself in the position of Congress and in facing the particular circumstances in question determine that an insolvent foreign bank not engaged in business in the United States or licensed to do business in the United States but which has assets in the United States is not a banking corporation of the type exempt from voluntary and involuntary bankruptcy under Section 4 of the Bankruptcy Act.

Courts must not be timorous in their interpretation of statutes to give them the meaning most consonant with the avowed objective of the legislation as a whole. *U. S.* v. *American Trucking Associations,* 310 U.S. 534, 543 (1939), quoted in *Perry* v. *Commerce Loan Co.,* 383 U.S. 392, 400 (1966). The determination here requested is "of great significance to the international banking community. The economic interdependence among nations in the role of international banking in national and international affairs has evolved dramatically in this century" (A-53). The national interest is not helped by doubts as to the existence

of jurisdiction in our international relations. Such uncertainty is an embarrassment.

During the past year the jurisdiction of the bankruptcy court has been invoked in connection with Bankhaus I.D. Herstatt KGaA i.L. of Cologne, Germany which had been ordered by the German Banking Supervisory Authority to cease business and to liquidate pursuant to the German Banking Law; by Banque de Financement S.A., a Swiss bank whose operations had been suspended by the Swiss Federal Banking Commission and which sought protection under Chapter XI; and in connection with Israel-British Bank Limited (the Israeli parent of Appellant).[6] The institution of the bankruptcy proceedings in New York with respect to said defunct foreign banks brought into play the provisions of the United States Bankruptcy Act. In each situation, in IBB's situation and in the situation of similar foreign banks doing business in the United States but having property here, the interested parties are relatively large institutions such as banks engaged in international transactions with a foreign bank, not people who are at an economic disadvantage *vis á vis* these enterprises. Almost inevitably by reason of the nature of the entity the foreign proceeding will be conducted at the foreign bank's domicile at which the special interest of depositors will be a major concern. The bankruptcy of foreign banks is indeed a special and esoteric insolvency situation that can be encompassed within the framework of the present Bankruptcy Act. To hold that such foreign banks should be denied the protection of the Act, when none of the reasons advanced either by Congress or the court pertain to such bank or to the public or quasi-public area in foreign countries in which they function is to frustrate the general purposes of the bankruptcy legislation. The court below at p. 32 (A-84) of its opinion says:

> "Where scrutiny of the legislative history unearths no clue that Congress has considered application of the statute to the particular facts at hand and where adherence to the statutory words themselves does not

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[6] See footnote *supra*, page 1.

frustrate the general objectives of the legislation, the words must be given effect as they read.

"* * * that foreign corporations are precluded from seeking adjudication as voluntary bankrupts."

To deny the benefits of the Bankruptcy Act to such foreign corporations would indeed frustrate the general objectives of the legislation to wit equal distribution of assets among creditors.

Admittedly, Congress could not have had at the time of enactment the circumstances of the aforesaiid banking corporation not engaged in banking operations in the United States specifically in mind when it drafted the "banking corporation" exception and it is beyond cavil that no evidence can be adduced that it did. However, we do know that in 1898 and thereafter the general policy of the Act allowed assumption of jurisdiction over assets in the United States belonging to a non-resident debtor; and we do know the reasons ascribed by legislators and the courts for the "banking corporation" exception none of which are considered criteria for including foreign banks. Therefore, no reason exists for thwarting the aforesaid general policy of the Act; to the contrary, sound national and international reason exists for permitting such foreign banks to invoke the protection of the Act and thus subserve its objective for creditors—in the United States and elsewhere.

CONCLUSION

For the reasons set forth above, the decision and order appealed from should be reversed on the law.

Respectfully submitted,

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ADDENDUM

BANKRUPTCY ACT

SECTION TWO (11 U.S.C. § 11)

§ 2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this Act;

SECTION FOUR (11 U.S.C. § 22)

§ 4. Who May Become Bankrupts. a. Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b. Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act. The bankruptcy of a corporation shall not release its officers, the members of its board of directors or trustees

or of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States. The status of an alleged bankrupt as a wage earner or farmer shall be determined as of the time of the commission of the act of bankruptcy.

BANKING LAW

§ 605. Voluntary liquidation; sale of assets; forfeiture of charter by non-user

* * *

11. (a) Any foreign banking corporation which has been licensed pursuant to article five of this chapter to engage in business in this state, including any such corporation whose license has expired or been revoked, may, if it so desires, take proceedings for the voluntary liquidation of its business and property in this state in accordance with the provisions of paragraph (b) of this subdivision;

BUSINESS CORPORATION LAW

§ 102. Definitions

(a) As used in this chapter, unless the context otherwise requires, the term:

* * *

(7) "Foreign corporation" means a corporation for profit formed under laws other than the statutes of this state, which has as its purpose or among its purposes a purpose for which a corporation may be formed under this chapter, other than a corporation which, if it were to be formed currently under the laws of this state, could not be formed under this chapter. "Authorized", when used with respect to a foreign corporation, means having authority under article 13 (Foreign corporations) to do business in this state.

§ 103. Application

* * *

This chapter shall not apply to a domestic corporation of any type or kind heretofore or hereafter formed under the banking law, insurance law, railroad law, transporta-

tion corporations law or cooperative corporations law, or under any other statute or special act for a purpose or purposes for which a corporation may be formed under any of such laws except to the extent, if any, provided under such law. It shall not apply, except to the extent, if any, provided under the banking law, insurance law, railroad law, transportation corporations law or cooperative corporations law, to a foreign corporation of any type or kind heretofore or hereafter formed which (1) has as its purpose or among its purposes a purpose for which a corporation may be formed only under the insurance law, banking law, railroad law, transportation corporations law or cooperative corporations law, and (2) is either an authorized insurer as defined in the insurance law or does in this state only the kind of business which can be done lawfully by a corporation formed under the banking law, railroad law, transportation corporations law or cooperative corporations law, as the case may be. After the effective date of this chapter the stock corporation law shall not apply to any corporation of any type or kind. The general corporation law shall not apply to a corporation of any type or kind to which this chapter applies. A reference in any statute of this state, which makes a provision of the stock corporation law applicable to a corporation of any type or kind, shall be deemed and construed to refer to and make applicable the corresponding provision, if any, of this chapter.

§ 1202. **Appointment of receiver of property of a domestic or foreign corporation**

(a) A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

* * *

(4) An action to preserve the assets in this state, of any kind, tangible or intangible, of a foreign corporation which has been dissolved, nationalized or its authority or existence otherwise terminated or cancelled in the jurisdiction of its incorporation or which has ceased to do business, brought by any creditor or shareholder of such corporation or by one on whose behalf an order of attachment against the property of such corporation has been issued.

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